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No. 87-1667

In the Supreme Court of the United States

OCTOBER TERM, 1987

GREGORY KIRK BELL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioner was improperly denied representation by counsel of his choice.

2. Whether the doctrine of collateral estoppel precluded the government from introducing evidence concerning offenses that had been the subject of an earlier trial.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A15) is reported at 831 F.2d 292 (Table).

JURISDICTION

The judgment of the court of appeals was entered on October 1, 1987. A petition for rehearing was denied on December 29, 1987 (Pet. App. A16-A17). The petition for a writ of certiorari was filed on February 29, 1988, and is therefore out of time under Rules 20.1 and 29.1 of the Rules of this Court. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Western District of Virginia, petitioner was convicted together with co-defendants Cornelius James Ryan,

Michael Becker, and James E. Stivers of conspiracy to possess cocaine with intent to distribute it and conspiracy to distribute cocaine, in violation of 21 U.S.C. 846. Petitioner was also convicted of conspiracy to possess marijuana with intent to distribute it, in violation of 21 U.S.C. 846.[1] Pet. App. A3-A4. He was sentenced to nine years' imprisonment and to fines totaling $15,000. The court of appeals affirmed (*id.* at A1-A15).

1. The government's evidence at trial is summarized in the opinion of the court of appeals (Pet. App. A4). It showed that petitioner was a participant in a scheme to smuggle cocaine and other controlled substances into Florida. Petitioner served as a source of cocaine when Rodrigo Poseda, an unindicted co-conspirator, was unavailable, but petitioner dealt principally in marijuana, selling it to other members of the conspiracy or trading it to them in exchange for cocaine.

At trial, petitioner was represented by Lane Vaughn, who was assisted by an associate, Joseph Sharit. On Tuesday, January 7, 1986, the day after the trial began, Vaughn informed the trial judge that he was ill and had to see a doctor. After a short recess, Sharit informed the court that Vaughn had been admitted to the hospital and was uncertain how long he would be required to remain there. The trial judge then telephoned Vaughn's doctor, who informed him that Vaughn had not been admitted to the hospital and that there was no reason why Vaughn could not continue participating in the trial. Accordingly, trial resumed on Thursday, January 8, 1986, with Vaughn acting as petitioner's lead counsel. Pet. App. A8-A9.

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[1] Co-defendants Ryan, Becker, and Stivers were also convicted of interstate travel for the purpose of conducting an unlawful drug enterprise, in violation of 18 U.S.C. 1952(a)(3). They were each sentenced to three-year terms of imprisonment.

On January 14, when the last government witness was on the stand, Vaughn informed the trial judge that his father had had a heart attack and that he wished to go home. The trial judge responded that it was up to petitioner and Vaughn to determine whether Vaughn should leave, but that, in any event, the trial would continue and that one of petitioner's attorneys would have to be present. When the trial resumed, Sharit informed the court that Vaughn had left to be with his father and that Sharit was uncertain what would ensue. Sharit also stated that petitioner objected to proceeding in Vaughn's absence and objected to Sharit's representation. Accordingly, he moved for a severance of petitioner's case from that of the co-defendants. 7 Tr. 75-77.

The trial judge denied the severance motion. In ruling, he commented that "Mr. Vaughn * * * left without even telling the court he was leaving[;] * * * he didn't even have the courtesy to tell the court that he was going." The trial judge also stated (C.A. App. 119-120):

> [W]e're going ahead with the case and [petitioner] knows this and Mr. Vaughn knows this. I know nothing about the condition of Mr. Vaughn's father. I had been told that it was not as serious as it was displayed yesterday, but that I do not know. And I'm just as sorry as I can be, * * * but it's obvious to the court that Mr. Vaughn has tried to delay or sever this case from the very beginning and I have told Mr. Vaughn that. I have told Mr. Vaughn that * * * most attorneys do not act in this court like he has acted.

Because petitioner had subpoenaed no witnesses and did not testify, Sharit's responsibility consisted of cross-examining the government's last witness concerning some telephone records and presenting summation (Pet. App. A9-A10). Petitioner subsequently moved for a new trial,

claiming that he had been denied the right to representation by counsel of his choice. The trial judge denied the motion.

2. Before his trial in this case, petitioner had been tried twice in the Eastern District of Louisiana on a charge of possessing 293 boxes of marijuana with intent to distribute the substance and charges of conspiring to import and to possess marijuana with intent to distribute it. A mistrial was declared during the first trial when the jury was unable to reach a verdict on any of the charges. At a retrial, the jury acquitted petitioner on the conspiracy counts but once again failed to reach a verdict on the possession count. The possession count was later dismissed without prejudice on the government's motion (Pet. App. A12).

In this case, the government introduced, over petitioner's objection, evidence that in New Orleans he had been in possession of uniquely packaged boxes of marijuana. Similar evidence had been admitted during the trials on the conspiracy and possession counts in the Eastern District of Louisiana.

3. On appeal, petitioner argued that he had been denied the right to representation by counsel of his choice. The court of appeals rejected that claim. The court reasoned that the right to specific counsel is not absolute and that the decision whether to proceed with a trial in the absence of counsel of the defendant's choice can be based on a balancing of several factors. Those factors include the status of the litigation, the convenience of the court and witnesses, the availability of other competent counsel, and the complexity of the case. The court of appeals noted that any other rule would enable a defendant to obtain a severance and a delay of his trial merely by arranging for his chosen counsel to become ill or unavailable and then informing the court that he did not wish to be represented

by anyone else. Because the trial judge believed that that was what occurred here, and because the court of appeals concluded that petitioner suffered no prejudice as the result of the substitution of Sharit for Vaughn at the conclusion of the government's case,[2] the court of appeals held that the trial court's decision to proceed despite Vaughn's absence was not an abuse of discretion. Pet. App. A10-A11.

Petitioner also claimed that the government was collaterally estopped from introducing the marijuana packages that were similar to those introduced during the trial in the Eastern District of Louisiana, because that trial had resulted in acquittals on the conspiracy counts. The court of appeals rejected that claim, reasoning that the acquittals on the conspiracy counts did not preclude the government from subsequently proving that petitioner possessed the package. Pet. App. A12-A13.[3]

Petitioner then filed a petition for rehearing and attached to it affidavits from both Vaughn and Sharit. Vaughn's affidavits averred that he had been retained as

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[2] The court of appeals observed: "The district court recognized that Sharit ably represented Bell in [cross-examining the last government witness and in summation], and, having read Sharit's summation, we agree" (Pet. App. A10).

[3] The court of appeals also rejected petitioner's claim that, even if the evidence of petitioner's possession of marijuana in New Orleans was properly admitted, the trial judge erred by failing to instruct the jury concerning the limited purposes for which that evidence could be considered (Pet. App. A13). Additionally, the court of appeals rejected claims by petitioner and his co-defendants that the government proved two separate conspiracies rather than the single conspiracy alleged in the indictment (*id.* at A5), and that, for purposes of considering the statements of alleged co-conspirators against one another, the court improperly left to the jury the determination whether a conspiracy existed and whether the defendants were participants in it (*id.* at A7).

counsel by petitioner and that Sharit, an associate in his law firm, had merely been designated to assist with legal research during the trial. As a result, Sharit did not participate in pretrial preparation and was absent from the courtroom during the testimony of several government witnesses (Pet. App. A18-A19). Vaughn also stated that on Tuesday, January 7, 1986, he was suffering from a stomach disorder and, at the trial judge's insistence, reported to a hospital emergency room where he was admitted for evaluation. After a two-day continuance to permit his recovery, he learned that his father had suffered a heart attack, and he left the trial after informing the trial judge that he was leaving regardless of whether the court gave its consent. Sharit's affidavits stated that he had not been personally retained by petitioner, that his trial experience consisted principally of prosecutions in state court rather than defense work and that he had been conducting legal research outside the courtroom during the testimony of certain government witnesses (*id.* at A25-A28).

In denying the petition for rehearing, the court of appeals noted that "[i]n arriving at [its] decision * * * [it] ha[d] considered the record on appeal from the district court but [that it] ha[d] not considered material not a part of that record which was later filed with us" (Pet. App. A16).

ARGUMENT

1. Petitioner contends (Pet. 11-31) that the trial court erred by requiring his case to proceed in the absence of his chosen counsel. More specifically, he maintains that the trial judge abused his discretion by failing to grant petitioner a severance or a continuance until Vaughn was again available to represent him.

a. As this Court recently reaffirmed, "while the right to select and be represented by one's preferred attorney is comprehended by the Sixth Amendment, the essential aim of the Amendment is to guarantee an effective advocate for each criminal defendant rather than to ensure that a defendant will inexorably be represented by the lawyer whom he prefers." *Wheat* v. *United States,* No. 87-4 (May 23, 1988), slip op. 6. Thus, although an accused's right to counsel of his choice is a component of the Sixth Amendment, the right is not absolute. See, *e.g., Wilson* v. *Mintzes,* 761 F.2d 275, 280 (6th Cir. 1985). As the court explained in *United States* v. *Mitchell,* 777 F.2d 248, 256 (5th Cir. 1985) (quoting *Gandy* v. *Alabama,* 569 F.2d 1318, 1323 (5th Cir. 1978)), cert. denied, 475 U.S. 1096 (1986):

> [T]he right to counsel of one's choice is not absolute as is the right to the assistance of counsel. The right to choose counsel may not be subverted to obstruct the orderly procedure in the courts or to interfere with the fair administration of justice. It is a right and a proper tool of the defendant, it cannot be used merely as a manipulative monkey wrench. A defendant cannot assume that the right to choose counsel affords "the right to obtain a delay at his whim and caprice, or to obtain a reversal because he was unable to frustrate justice." Rather, the proper exercise of the trial court's discretion requires a delicate balance between the defendant's due process right to adequate representation by counsel of his choice and the general interest in the prompt and efficient administration of justice.

Because of the "fact-specific conflicts between individual rights and state interests" posed by requests for continuances to permit representation by counsel of choice, "trial courts must be accorded wide discretion [in

passing on such requests] notwithstanding that constitutional rights may be implicated." *Sampley* v. *Attorney General,* 786 F.2d 610, 613 (4th Cir.), cert. denied, 478 U.S. 1008 (1986). The courts of appeals have adopted a multi-factor balancing analysis for determining whether that discretion is reasonably exercised. Pertinent considerations include "the length of the delay [anticipated]; whether the lead counsel has associates prepared to try the case in his absence; whether other continuances have been requested and received; the convenience or inconvenience to litigants, witnesses, opposing counsel, and the court; whether the delay seems to be for legitimate reasons, or whether it is purposeful and dilatory; and other relevant factors [including whether the defendant is competently and properly represented by surrogate counsel]." *Giacalone* v. *Lucas,* 445 F.2d 1238, 1240, 1243 (6th Cir. 1971), cert. denied, 405 U.S. 922 (1972); see also *United States* v. *Mitchell,* 777 F.2d at 257; *Wilson* v. *Mintzes,* 761 F.2d at 281; *Gandy* v. *Alabama,* 569 F.2d at 1324.

The trial judge's refusal to delay the trial in this case did not constitute an " 'unreasoning and arbitrary "insistence upon expeditiousness in the face of a justifiable request for delay." ' " *Sampley* v. *Attorney General,* 786 F.2d at 613 (quoting *Morris* v. *Slappy,* 461 U.S. 1, 11-12 (1983)). In the first place, because Vaughn had earlier obtained a continuance by claiming medical problems that proved to be unsubstantiated, the trial judge viewed Vaughn's claim that he had to leave to attend his ailing father with understandable skepticism. The judge observed that "Vaughn ha[d] tried to delay or sever this case from the very beginning" (Pet. App. A9-A10) and that "[m]ost attorneys do not act in this court like he has acted" (*id.* at A11). Second, when Vaughn absented himself from the trial, he did not advise the trial judge concerning the likely duration of the absence. It was therefore uncertain how

long a delay would be necessary to accommodate Vaughn's personal needs. Third, on Vaughn's departure, an associate, who had earlier participated in petitioner's defense, was available to assume Vaughn's duties. Fourth, Vaughn's absence occurred at the conclusion of the government's case. Thus, a severance for the purpose of obtaining additional time would have required a repetition of almost the entire trial before a different jury and would have resulted in substantial inconvenience to the court, the government, and the witnesses. Cf. *United States* v. *Mardian,* 546 F.2d 973, 980-981 (D.C. Cir. 1976) (failure to grant severance when defendant's counsel was taken ill held an abuse of discretion because only a small part of the trial had elapsed and severance would not have caused undue disruption). Finally, because of the timing of Vaughn's departure, petitioner was represented by Vaughn throughout almost the entire trial; Sharit's role was limited to cross-examining the government's final witness concerning telephone records and making a summation. And, because petitioner had not subpoenaed any witnesses to testify on his own behalf, it did not appear that Sharit would be required to present a defense case. After fully reviewing the record, both courts below found that Sharit ably represented petitioner in fulfilling these responsibilities. Petitioner therefore was not prejudiced by the trial court's failure to postpone the proceedings pending Vaughn's return. See *Giacalone* v. *Lucas,* 445 F.2d at 1243 (noting that defendant was properly and competently represented by substitute counsel).

The authorities cited by petitioner in support of his claim that the trial judge should have delayed the trial pending the return of Vaughn are all distinguishable on their facts. Many of those cases involved pretrial requests for continuances. In those cases, the trial courts had not invested substantial resources in jury selection and the

presentation of evidence. For example, in *Gandy* v. *Alabama,* 569 F.2d 1318 (5th Cir. 1978), the motion for a continuance was made before trial, and "the trial court did not investigate or consider reasonable alternatives to the simple denial of the motion" (*id.* at 1328 (footnote omitted)). Moreover, the case involved "a retained lawyer's abandonment of his client and a trial court's insensitive acquiescence in the desertion despite practical alternatives" (*id.* at 1327-1328), factors that according to the court of appeals made that case "unique" (*id.* at 1327). *Linton* v. *Perini,* 656 F.2d 207 (6th Cir. 1981), cert. denied, 454 U.S. 1162 (1982), likewise involved a pretrial request for a continuance. In holding that the trial judge should have granted the request, the court of appeals observed that "[d]efendant's retained counsel had not received any prior continuances and nothing in the record indicates that the requested continuance involved a scheme to delay the trial. There was no showing of inconvenience to the witnesses, opposing counsel, or the court" (*id.* at 212).

In *United States* v. *Koblitz,* 803 F.2d 1523 (11th Cir. 1986), it became clear before trial that the defendants' previously retained counsel would be unable to appear on the scheduled trial date because they were occupied with another lengthy trial. The court of appeals held that the trial court properly *denied* a continuance despite the defendants' insistence that they would go to trial only with those attorneys (*id.* at 1528). The court found error only in the trial judge's requirement that the defendants' trial counsel be responsible for obtaining substitutes rather than permitting the defendants to select new counsel of their choice. In *Releford* v. *United States,* 288 F.2d 298 (9th Cir. 1961), when the defendant's retained counsel was hospitalized before trial, the trial judge refused to grant a requested two-week continuance. Instead, the court

directed an attorney who shared offices with retained counsel to represent the defendant. Because that attorney "only shared offices with [retained counsel], * * * did not willingly serve as Releford's counsel[,] * * * was not appointed by the court as Releford's attorney[,] * * * [and] was not chosen by Releford" (*id.* at 302), the court of appeals held that the trial court should not have required Releford to proceed to trial represented by that attorney. None of these cases stands for the proposition that a court must grant a midtrial continuance, at great inconvenience to the affected participants, when it has available the alternative of allowing the trial to proceed with the defendant represented by a competent lawyer who has already participated in his defense.

Other cases on which petitioner relies are even more clearly inapposite. In *United States* v. *Seale,* 461 F.2d 345 (7th Cir. 1972), the court of appeals found error in the trial court's refusal even to *inquire* into the basis for the defendant's dissatisfaction with counsel (*id.* at 356-361). The court of appeals did not hold that, if it had made appropriate inquiries, the trial court would have lacked the authority to require the defendant to proceed with a lawyer who was not the defendant's preferred counsel (see *id.* at 361 n.29).

Wilson v. *Mintzes,* 761 F.2d 275 (6th Cir. 1985), involved the situation, entirely different from this case, in which a midtrial confrontation between the trial court and defense counsel led the defendant to express dissatisfaction with his representation and defense counsel to refuse to participate further in the trial. The court of appeals held that the trial court acted unreasonably in failing to heed the defendant's expressions of dissatisfaction (*id.* at 282).

Finally, in *United States* v. *Tramunti,* 513 F.2d 1087 (2d Cir.), cert. denied, 423 U.S. 832 (1975), a defendant's attorney in a multi-defendant trial died while trial was in

progress. The trial judge denied new counsel a continuance to familiarize himself with the case. The court of appeals held that the denial constituted an abuse of discretion, noting that there was no evidence that the request constituted a bad-faith attempt to delay the trial and that a delay of only two days would have resulted if the continuance had been granted (*id.* at 1116-1117). In this case, by contrast, the trial court suspected that the defendant was engaging in dilatory tactics, and the duration of any possible delay was uncertain.

b. In addition, petitioner claims (Pet. 16) that, even if the trial court's midtrial substitution of Sharit for Vaughn was proper, the judge abused his discretion in not granting Sharit a delay to permit adequate preparation. As this Court explained in *Morris* v. *Slappy*, 461 U.S. at 11-12 (quoting *Ungar* v. *Sarafite*, 376 U.S. 575, 589 (1964)), however, "[t]rial judges necessarily require a great deal of latitude in scheduling trials. * * * Consequently, broad discretion must be granted trial courts on matters of continuances; only an unreasoning and arbitrary 'insistance upon expeditiousness in the face of a justifiable request for delay' violates the right to the assistance of counsel."

The trial judge did not abuse that broad discretion in this case. Sharit had previously assisted in petitioner's defense and therefore could reasonably be expected to be conversant with the case. As the court below recognized (Pet. App. A10-A11), Sharit was not required to assume the role of lead counsel until the case had almost been concluded, and he ably represented petitioner throughout the final phases of the trial. Accordingly, denial of the requested delay did not adversely affect the adequacy of Sharit's representation or otherwise prejudice petitioner. See *Chambers* v. *Maroney*, 399 U.S. 42, 53-54 (1970).

c. Petitioner further maintains (Pet. 30-31) that, in denying his petition for rehearing, the court below

improperly failed to consider averments contained in the attached affidavits of Vaughn and Sharit. But "[i]t is elementary that [a] court cannot consider any material that is not a part of the record." *United States* v. *Donsky,* 825 F.2d 746, 749 (3d Cir. 1987); see, *e.g., Government of the Virgin Islands* v. *Harrigan,* 791 F.2d 34, 36 (3d Cir. 1986); *United States* v. *Bosby,* 675 F.2d 1174, 1181 n.9 (11th Cir. 1982); Fed. R. App. P. 10(a). That principle plainly applies to materials such as affidavits submitted by a party for the first time in a petition for rehearing, because such materials are "not properly a part of the record on appeal." *United States* v. *Salinas,* 701 F.2d 41, 41 (5th Cir. 1983). The court of appeals therefore acted properly in refusing to consider the affidavits.

2. Petitioner also claims (Pet. 32-49) that the introduction of the packaged marijuana that he was alleged to have possessed in New Orleans violated the doctrine of collateral estoppel. More specifically, he maintains that his acquittal of conspiracy to import marijuana and his acquittal of conspiracy to possess marijuana with intent to distribute it preclude relitigation of factual matters relating to possession of the same marijuana. This argument, however, fundamentally misperceives the scope of the doctrine of collateral estoppel.

As the Court explained in *Ashe* v. *Swenson,* 397 U.S. 436, 443 (1970), collateral estoppel "means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit." In determining whether collateral estoppel applies, the court must " 'examine the record of a prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter, and conclude whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from con-

sideration' " (*id.* at 444 (footnote and citation omitted)). And the burden is on the defendant to show that the jury's verdict in the prior trial *necessarily* decided the issue raised in the second prosecution. See, *e.g.*, *Hess* v. *Medlock*, 820 F.2d 1368, 1373 (4th Cir. 1987); *United States* v. *Boldin*, 818 F.2d 771, 775 (11th Cir. 1987); *United States* v. *Gentile*, 816 F.2d 1157, 1162 (7th Cir. 1987); *United States* v. *Baugus*, 761 F.2d 506, 508 (8th Cir. 1985); *United States* v. *Medina*, 709 F.2d 155, 156 & n.** (2d Cir. 1983).

Under these principles, petitioner's acquittal on the conspiracy counts did not collaterally estop the government from showing in this case that petitioner had possessed the same marijuana in New Orleans. In acquitting petitioner on the conspiracy counts, the jury may simply not have been convinced beyond a reasonable doubt that he was a participant in concerted rather than unilateral criminal activity. If the jury had been convinced that there was a reasonable doubt whether petitioner had possessed marijuana with intent to distribute it, it would have returned an acquittal on that charge as well, but it did not. Accordingly, the conspiracy acquittals did not foreclose relitigation of the question whether petitioner possessed the marijuana at issue. See *United States* v. *Jackson*, 778 F.2d 933, 940 (2d Cir. 1985) ("[t]here can * * * be no general principle that, after acquittal on a conspiracy count, the Government may not retry a defendant on a related substantive count"), cert. denied, No. 86-5098 (Oct. 14, 1986); accord *United States* v. *Kalish*, 780 F.2d 506, 509 (5th Cir.), cert. denied, 476 U.S. 1118 (1986); *United States* v. *Nelson*, 599 F.2d 714, 717 (5th Cir. 1979) (because acquittal on drug conspiracy count could have been premised on element of agreement, verdict not preclusive as to facts essential to proof of substantive possession count).[4]

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[4] The authorities cited by petitioner (Pet. 36-46) are not to the contrary. None of the cases holds that an acquittal on a conspiracy charge

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfuily submitted.

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can collaterally estop the government from showing that the defendant committed *substantive* offenses on which the first jury did not return a verdict of acquittal.

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